No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,
Appellants,

-vs-

TITLE AND TRUST COMPANY, a corporation, PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees.

REPLY OF APPELLANTS TO BRIEF OF APPELLEES WINANS

On Appeal from the United States District Court for the District of Oregon.

HON. GUS J. SOLOMON, Judge.

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THE GENERAL THEORY OF THE WINANS' BRIEF

We must confess that we are puzzled by statements in the Winans' brief. One of these statements appears on page 24, as follows:

> "No Oregon cases have been found on the right of action for damages for intentional falsehood. . . ."

There are, of course, many Oregon cases in which plaintiffs have sought "damages for intentional falsehoods". Three of them are *Cooper v. Phipps,* 24 Or. 357, 33 P. 985, 986, 22 LRA 836; *McKinney v. Cooper,* 163 Or. 512, 98 P.2d 711; and *Strycker v. Levell and Peterson,* 183 Or. 59, 190 P.2d 922, all referred to in our original brief (pp. 74-6).

Another statement which, it seems to us, does not aid clarity of analysis is on page 14:

> "The Winans' cross-claim is not an action for slander . . . but is an action on the case."

With equal logic it could be said that it is not an action for slander but an action in tort. For the action of slander is itself one of the historic examples of "an action on the case". Townshend on Libel and Slander (4th ed.) 36; 2 Selwyn's Nisi Prius (7th Am. Ed.) 1045; 33 Am. Jur., Libel and Slander, sec. 224, p. 207; 53 CJS, Libel and Slander, sec. 152, p. 237.

But, counsel's protestations to the contrary notwithstanding, their brief clearly discloses, as did their pleadings, that what they are seeking is compensation for alleged slander. This not only appears from the frequent assertions that the statements "slandered the Winans" (p. 11) and "constituted slander" (p. 36), but also from the contents of three subdivisions of the brief labeled "Slander *per se*", (pp. 36-40), "Slander *per quod*", (pp. 40-1), and "Libel', (pp. 41-2).

Furthermore, even though it be regarded as an "action on the case" (in the sense in which that nomenclature seems to be used by Winans' attorneys) it is neces-

sary that, with respect to each alleged wrongful act included within the charges made, e.g., the alleged slander, the plaintiff prove his contention that there was an actionable wrong committed against him. *Condit v. Boddings,* 147 Or. 299, 326-8, 33 P.2d 240, 250-1. So that no matter how the case is viewed, if the Winans have no cause of action for slander, they have no case.

The New York case of *Al Raschid v. News Syndicate Co., Inc.,* 265 N.Y. 1, 191 N.E. 713, relied upon by the Winans (Br. 20-1), seemingly has introduced a novel offshoot of the law of libel and slander, a departure which seemingly has not been adopted in other states. Professor Prosser in a chapter on his work on torts, which he calls "Injurious Falsehood", includes this case among various others in a branch of the law often referred to as the Law of Disparagement (Prosser on Torts, sec. 106, pp. 1036-49). As he points out, this phase of the law "has variously been called 'disparagement of property', 'slander of goods', and 'trade libel' " (p. 1037). It applies to "statements injurious to the plaintiffs business but casting no reflection upon either his person or his property", but adds that the doctrine "has even been carried over to interference with prospective non-commercial advantage, such as the expectancy of a marriage, or the right to remain in the United States rather than be deported"—citing the *Al Raschid* case on this latter point (Id. p. 1037).

The rule of the *Al Raschid* case has been referred to in New York as one which applies "only if the false statements are not actionable as libels or slanders, either because they are non-defamatory or for other reasons."

Dubouneq v. Brouwer, 124 N.Y. Supp. 2d 61, aff'd 124 N.Y. Supp. 842. For this reason and also because the rules of privilege apply to these "injurious falsehood" or "disparagement" cases (Prosser on Torts, sec. 106, pp. 1045-7), it is difficult to understand how this novel rule of law either applies in this case, or if it does, how it aids the Winans.

PRIVILEGE

Much of the Winans' brief is devoted to an elaboration of the historical and philosophical background of the general rule of torts that intentional infliction of damages gives rise to a cause of action, that "every man shall have remedy by due course of law for injury done him in his person, property or reputation" (Br. 22-6). On page 19 there is a quotation from Restatement of Torts, sec. 873, setting forth the general rule that intentional false statements subject one to liability. But statements such as this are, as of course the Restatement recognizes, subject to qualifications—among others, the rules of privilege. As comment (a) of the section quoted (sec. 873) states, the rule of that section "overlaps the rules stated in other Sections of the Restatement of this subject". (See also sec. 10 and sec. 890, comment (d).)

In our first brief (pp. 74-5) we called attention to the Restatement of Torts, secs. 587, 588. The first of these sections lays down the rule that:

> "A party to a private litigation . . . is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, . . ."

Section 588 lays down the rule that a witness

> ". . . is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding. . . ."

And comment (b) of sec. 588 states that a witness has an absolute privilege

> ". . . while engaged in private conferences with an attorney at law with reference to proposed litigation."

These sections of the Restatement were quoted with approval, as we pointed out in our first brief (pp. 75-6), by the Oregon Supreme Court in *Strycker v. Levell and Peterson,* 183 Or. 59, 67-8, 190 P.2d 922, 925, but no reference is made to them in Winans' brief.

In this connection, we believe it important to bear in mind who the attorneys were with whom the Parkers were consulting when it is claimed they slandered Winans. Two of them, Marsh and Dashney, were Parkers' then attorneys, and the other two, Buell and Altstadt, represented the Company. Under the proposed agreement the Parkers themselves were to be the plaintiffs in a proposed suit against the Winans; and Buell's firm was to represent them in that suit, unless the Company designated other attorneys to do so (R. 1903, 1910). The conferences were for the purpose, among others, of determining the basis of the Parkers' proposed suit against the Winans. So the situation comes exactly within both the above rules of the Restatement, that the absolute privilege protects both a *party* and a *witness* "in communications preliminary to a proposed judicial proceeding."

Counsel cite, in opposing the claim of privilege, the New York Supplement case of *Schauder v. Weiss,* 88 N.Y. Supp. 2d 317, aff'd 276 App. Div. 967, 94 N.Y. Supp. 2d 748 (Br. 42-3). That case did not involve, as this case does, conferences with an attorney, either by a party or a witness, with respect to forthcoming litigation. A detective agency "made an alleged investigation of plaintiff's conduct and maliciously, falsely and fraudulently made a report . . . accusing plaintiff of committing adultery". The report of the case does not make it clear to whom the report was made, although there is some indication it was "to diverse persons". At any rate, *Strycker v. Levell,* supra, is the law of the state of Oregon, and to the extent that the New York case is in conflict with it, it must be disregarded.

The New York case just discussed, as will be seen from the quotation in the Winans' brief (pp. 42-3), adopts the "injurious falsehood" theory, discussed above. A New York case more in point, which also involves that novel rule of law, is *Lucci v. Engel,* 73 N.Y. Supp. 78. There, false statements were made in connection with adoption proceedings. The court pointed out that the statements were "not necessarily defamatory" and therefore the rules of libel did not apply. But, the court added:

> "The statements were, however, absolutely privileged since they were pertinent to the adoption proceeding in the Surrogate's Court and the same reasons that have led to the granting of an absolute privilege to pertinent statements made in the course of judicial proceedings in libel or slander actions, require a similar conclusion in the case of injurious falsehood based upon nondefamatory statements."

The Winans' brief attempts to make the point that the claim of privilege was not pleaded (pp. 45-6). (We assume that the statement, p. 45, that the claim of privilege "makes its first appearance in this case in their briefs" is not intended as a statement that counsel were not advised theretofore that a claim of privilege was asserted.) The further claim is also made that actually the communications to the Title Company's attorneys were not for the purpose of giving them information to be used in connection with the proposed action (p. 45).

Both of these contentions can largely be answered by reference to the Winans' cross-claim and to the evidence introduced by them. The cross-claim itself states that the statements made were made in anticipation of legal proceedings (R. 89-90); and *all* of the evidence upon which the claim of privilege was based (some of which is referred to above and more will be discussed presently) was introduced by the Winans themselves (R. 1769-1812).

In either of the above situations, affirmative pleading is not necessary. The case referred to above, *Strycker v. Levell and Peterson,* 183 Or. 59, 190 P.2d 922, was decided on demurrer to a complaint, there being no necessity for any affirmative pleading by the defendant since the complaint disclosed that the communications were privileged. It is also a rule with respect to these so-called affirmative defenses that if the plaintiff's own evidence shows, as it did here, that the defense exists, plaintiff is not entitled to prevail even though the matter has not been affirmatively pleaded by the defendant. *Adair, Admx. v. Valley Flying Service,* 196 Or. 479, 250 P.2d 104.

THE EVIDENCE OF SLANDER AND DAMAGES RESULTING THEREFROM

(a) *The alleged slander.* In attempting to prove that there was slander, the Winans' brief quotes from the testimony of attorney Buell that Parker stated in the conferences "that he did not know anything about any defect in the title until after the deed had been received and recorded", but that Parker also stated that on the one occasion when he talked to Winans "there was no dicussion between them as to the title". He also said that it was always "assumed that the Parkers had no knowledge of the defect" (Br. 27-8). On this latter point testimony of another attorney at the conferences is given, together with recitals in the various contracts that were tendered (p. 28).

Aside from this, the only evidence referred to in the brief is (1) that the Parkers "staged a show of surprise" when they saw the file of the Winans' negotiations for settlement on their title policy (p. 29), (2) a statement made in Parker's deposition that he remembered saying to somebody who was present at the meetings that Paul Winans had said that he had a good and marketable title, and (3) a notation by Parker in his diary (R. 2236) that "I told them I thought Winans thought they owned the property or they would not have gave me a deed for it" (Br. p. 39).

The facts, pointed out in our first brief, that both the Vice-President of the Title Company, a lawyer, and Buell, the attorney, said they could recall no representa-

tions in any of these conferences (App. Br. 80), that the Title Company had decided to sue Winans before they ever met the Parkers (p. 83), and that in drafting the charges against Winans "was relying primarily on the complaint the Title Company's attorney in making the option itself" as a "representation of marketable title" (p. 84), are all entirely disregarded in the Winans' brief.

(b) *Evidence of damages.* Likewise, the brief entirely disregards, what we also pointed out in our first brief, that the newspaper articles which caused Winans the most trouble were published *prior* to the filing of the action (Br. 88-9) and that at no place in the original complaint was there any charge that any of the Winans falsely represented anything to the Parkers (p. 84). They relegate to a footnote their references to this original complaint (Br. 41, n. 23); and a reading of the portions thereof there cited merely corroborates what we have already said, as just set forth.

"As to their reputation," the brief says, referring to the Winans (p. 48), the public had an "extreme public interest" in everything affecting the shores of Lost Lake, and accordingly "news articles dealing with the sale of the Winans' property on Lost Lake were widely read;". But what the brief ignores is that most of these articles were published *prior* to the filing of the complaint (R. 1925-8, 2274-6). But although Winans' brief states that (p. 49) "the charges against the Winans of falsely representing their property were widely discussed", at no place does it recognize the fact that not only, as already pointed out, did the complaint not charge that Winans had misrepresented the property to the Parkers, but

neither of the newspaper articles published *after* the filing of the complaint made any such charge (R. 1928-31, 2276-7). (See further, on this, our original br. pp. 84-90, ignored in the Winans' brief.)

The rest of the Winans' arguments regarding damages we believe are adequately covered in our first brief (pp. 86-94).

Respectfully submitted,

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